

(A)
No. 95-7452

Supreme Court, U.S.

FILED

JUN 5 1996

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KENNETH LYNCE,
Petitioner

v.

**HAMILTON MATHIS, SUPERINTENDENT, TOMOKA
CORRECTIONAL INSTITUTION, et al.**

**On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

JOINT APPENDIX

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**PETITION FOR WRIT OF CERTIORARI FILED JANUARY 10, 1996
CERTIORARI GRANTED MAY 13, 1996**

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDING
8/18/94	PETITION for writ of habeas corpus
1/20/95	RESPONSE by petitioner Kenneth Lynce to Magistrate Judge's oral order of 01-04-95
3/6/95	RESPONSE by respondent Harry K. Singletary Jr. to petition for writ of habeas corpus and response to show cause order entered February 21, 1995
3/14/95	REPORT AND RECOMMENDATIONS of Magis. Judge David A. Baker. That the petition for writ of habeas corpus be denied and the case be dismissed with prejudice. Objections to R and R due by 3/31/95. etc
4/24/95	OBJECTIONS by petitioner Kenneth Lynce to report and recommendations
5/10/95	ENDORSED ORDER approving report and recommendations, denying petition for writ of habeas corpus. Case dismissed with prejudice.
6/16/95	ORDER denying petitioner's application for certificate of probable cause

[Filed Aug. 18, 1994]

**FORM FOR USE IN APPLICATIONS
FOR HABEAS CORPUS UNDER U.S.C. § 2254**

NAME: Kenneth Lynce, et. al.

PRISON NUMBER: 352641

NAME OF PLACE OF CONFINEMENT:
Tamoka Correctional Institution

ADDRESS OF PLACE OF CONFINEMENT:
3950 Tiger Bay Road
Daytona Beach, FL 32124

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

Case No. 94-891-CIV-ORL-18

KENNETH LYNCE,
vs. *Petitioner,*

SUPERINTENDENT HAMILTON MATHIS, et. al.,
and *Respondent,*

THE ATTORNEY GENERAL OF THE STATE OF FLORIDA,
ROBERT BUTTERWORTH,
Additional Respondent.

* * * *

PETITION

1. Name and location of court which entered the judgment under attack: Ninth Judicial Circuit Court, Orange County, Florida

2. Date of judgment of conviction: April 14, 1986
3. Length of sentence: 22 years
4. Sentencing judge: Judge Walter Komanski
5. Nature of offense or offenses for which you were convicted: First Attempter Murder Burglary, Sale & Delivery of Cocaine
6. What was your plea? (Check one)
 - (a) Not guilty ()
 - (b) Guilty (✓)
 - (c) Nolo contendere ()

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: N/A
7. Kind of trial (Check one)
 - (a) Jury ()
 - (b) Judge only (✓)
8. Did you testify at the trial? Yes () No (✓)
9. Did you appeal from the judgment of the conviction? (Yes) No (✓)
10. If you did appeal, answer the following:
 - (a) Name of Court No
 - (b) Result N/A
 - (c) Date of Result N/A

If you filed a second appeal or filed a petition for certiorari in the Florida Supreme Court or the United States Supreme Court, give details: No
11. State *concisely* every ground on which you claim you are being held unlawfully. Summarize *briefly* the facts supporting each ground.

CAUTION:

In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by a plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequence of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and

seizure, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).

- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).
- (e) Conviction obtained by violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by the violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.
- A. Ground one: Futility exemption to exhaustion of requirement of state remedies.

Supporting FACTS (tell your story *briefly* without citing cases or law):

See Memorandum of Law

Exhaustion of ground one in the state courts:

- (1) Did you raise ground one in the appropriate Florida District Court of Appeals on a direct appeal of your conviction? Yes () No (✓)
- (2) After your conviction did you raise ground one in the state circuit court that sentenced you by filing a Florida Rule 3.850 Motion to Vacate, Set Aside, or Correct Sentence?
Yes () No ()

(a) If your answer is "yes", then state:

- i. Whether you received an evidentiary hearing N/A
- ii. The result N/A
- iii. The date of the result N/A

(b) If your Rule 3.850 Motion was denied, then did you file an appeal of that denial with the appropriate Florida District Court of Appeals? Yes () No (✓)

- i. If you failed to appeal the denial of your Rule 3.850 motion, then explain briefly why you did not N/A

(3) Have you raised ground one in any other petition, application, or motion filed in the state courts of Florida? Yes () No ()

If your answer is yes, then give the details, including the grounds raised, the court's decision, and the date of said decision for each such petition, application, or motion. N/A

B. Ground two: Petitioner is entitled to a Temporary Restraining Order and Preliminary Injunction.

Supporting FACTS (tell your story *briefly* without citing cases or law):

See Memorandum of Law

Exhaustion of ground two in the state courts:

- (1) Did you raise ground two in the appropriate Florida District Court of Appeals on a direct appeal of your conviction? Yes () No (✓)
- (2) After your conviction did you raise ground two in the state circuit court that sentenced you by filing a Florida Rule 3.850 Motion to Vacate, Set Aside, or Correct Sentence? Yes () No (✓)

(a) If your answer is "yes", then state:

- i. Whether you received an evidentiary hearing N/A
- ii. The result N/A
- iii. The date of the result N/A

(b) If your Rule 3.850 Motion was denied, then did you file an appeal of that denial with the appropriate Florida District Court of Appeals? Yes () No (✓)

- i. If you failed to appeal the denial of your Rule 3.850 motion, then explain briefly why you did not N/A

(3) Have you raised ground two in any other petition, application, or motion filed in the state courts of Florida? Yes () No (✓)

If your answer is yes, then give the details, including the grounds raised, the court's decision, and the date of said decision for each such petition, application, or motion N/A

C. Ground three: Reinterpretation of provisional creits laws is a violation of the ex post facto law.

Supporting FACTS (tell your story *briefly* without citing cases or law):

See Memorandum of Law.

Exhaustion of ground three in the state courts:

- (1) Did you raise ground three in the appropriate Florida District Court of Appeals on a direct appeal of your conviction? Yes () No (✓)
- (2) After your conviction did you raise ground three in the state circuit court that sentenced you by filing a Florida Rule 3.850 Motion to Vacate, Set Aside, or Correct Sentence? Yes () No (✓)
- (a) If your answer is "yes", then state:

- i. Whether you received an evidentiary hearing N/A
 - ii. The result N/A
 - iii. The date of the result N/A
 - (b) If your Rule 3.850 Motion was denied, then did you file an appeal of that denial with the appropriate Florida District Court of Appeals? Yes () No (✓)
 - i. If you failed to appeal the denial of your Rule 3.850 motion, then explain briefly why you did not N/A
 - (3) Have you raised ground three in any other petition, application, or motion filed in the state courts of Florida? Yes () No (✓)
- If your answer is yes, then give the details, including the grounds raised, the court's decision, and the date of said decision for each such petition, application, or motion N/A

D. Ground four: N/A

Supporting FACTS (tell your story *briefly* without citing cases or law): N/A

Exhaustion of ground four in the state courts:

- (1) Did you raise ground four in the appropriate Florida District Court of Appeals on a direct appeal of your conviction? Yes () No (✓)
- (2) After your conviction did you raise ground four in the state circuit court that sentenced you by filing a Florida Rule 3.850 Motion to Vacate, Set Aside, or Correct Sentence? Yes () No (✓)
- (a) If your answer is "yes", then state:
 - i. Whether you received an evidentiary hearing.

- ii. The result N/A
 - iii. The date of the result N/A
 - (b) If your Rule 3.850 Motion was denied, then did you file an appeal of that denial with the appropriate Florida District Court of Appeals? Yes () No (✓)
 - i. If you failed to appeal the denial of your Rule 3.850 motion, then explain briefly why you did not N/A
 - (3) Have you raised ground four in any other petition, application, or motion filed in the state courts of Florida? Yes () No (✓)
- If your answer is yes, then give the details, including the grounds raised, the court's decision, and the date of said decision for such petition, application, or motion N/A
12. Other than a direct appeal and other than the post conviction motions disclosed in your answer to question 11 above regarding exhaustion of state remedies, have you previously filed any petitions, applications, or motions with respect to this judgment and conviction in any court, state or federal?
- Yes () No (✓)
13. If your answer to 12 was "yes", give the following information:
- (a) (1) Name of court N/A
 - (2) Nature of proceeding N/A
 - (3) Grounds raised N/A
 - (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No (✓)
 - (5) Result N/A
 - (6) Date of result N/A

- (b) As to any second petition, application or motion give the same information:
- (1) Name of court N/A
 - (2) Nature of proceeding N/A
 - (3) Grounds raised N/A
 - (4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes () No (✓)
 - (5) Result N/A
 - (6) Date of result N/A
- (c) Did you appeal to the highest court having jurisdiction the result of any action taken on any petition, application or motion:
- (1) First petition, etc. Yes () No (✓)
 - (2) Second petition, etc. Yes () No (✓)
- (d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: N/A
14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes () No (✓)
15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
- (a) At the preliminary hearing N/A
 - (b) At arraignment and plea N/A
 - (c) At trial N/A
 - (d) At sentencing N/A
 - (e) On appeal N/A

- (f) In any post-conviction proceeding N/A
 - (g) On appeal from any adverse ruling in post-conviction proceeding N/A
16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes () No (✓)
17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes () No (✓)
- (a) If so, give name and location of court which imposed sentence to be served in the future: N/A
 - (b) And give date and length of sentence to be served in the future: N/A
 - (c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes () No (✓)

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I UNDERSTAND THAT ANY FALSE STATEMENT OR ANSWER TO ANY QUESTIONS IN THIS APPLICATION WILL SUBJECT ME TO THE PENALTIES OF PERJURY (A FINE OF \$10,000 OR IMPRISONMENT FOR FIVE (5) YEARS, OR BOTH).

I declare that under penalty of perjury that the foregoing is true and correct.

Executed on 8-15-94

/s/ Kenneth Lynce A-35-26-41

Signature of Attorney (If Any)

[Filed Aug. 18, 1994]

IN THE UNITED STATES DISTRICT COURT
OF THE MIDDLE DISTRICT OF FLORIDA

Case Number: 94-891-CIV-ORL-18

KENNETH LYNCE, *et. al.*,
Petitioner,

v.

HAMILTON MATHIS, Superintendent,
Respondent.

MEMORANDUM OF LAW

This is an memorandum of law to a petition for writ of habeas corpus, pursuant to U.S.C. Title 28, § 2254.

KENNETH LYNCE #352641
Tomoka Correctional Institution
3950 Tiger Bay Road
Daytona Beach, FL 32124

GROUND ONE

While this petitioner fully respects the principles of comity which underlie the federal system of collateral review and also fully understands the requirements of exhausting state judicial review, he claims exemption to this rule under futility exemption.

Under limited circumstance, such as cases where presentation to state courts would be futile due to adverse Supreme Court precedent, federal courts may excuse habeas petitioners from compliance with the exhaustion requirement 28 U.S.C.A. § 2254 (b & c).

Futility brought about by adverse precedent is sufficient to make exhaustion of state remedies unnecessary for habeas corpus purposes. If the state's highest court has recently rendered an adverse decision in an identical case and if there is no reason to believe state court would change its position, federal court should not dismiss the petitioner for federal habeas corpus for failure to exhaust state remedies. *Layton v. Carson*, 479 F. 2d 1275 (5th Cir. 1973); *Spencer v. Texas*, 385 U.S. 554, 87 S. Ct. 648 (1967).

In *Dugger v. Rodrick*, 584 So. 2d 2 (Fla. 1991) and *Dugger v. Grant*, 610 So. 2d 428 (Fla. 1992), the Florida Supreme Court addressed the substantially similar to the present case. In *Grant*, an inmate convicted of Second Degree Murder and receiving provisional and administrative gaintime credits, lost these credits retroactively and in the future should such credits be awarded once more. Since there is no reason to expect that the Florida Supreme Court would depart from its precedent in *Rodrick* and *Grant*, it is apparent that any efforts to exhaust state remedies, would only served to force the petitioner to postpone his federal hearing until he has completed a useless progression through the state remedial machinery and forestall the wasteful use of judicial resources resulting from vain application to the state courts. (note, *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1099-1100).

Technical exception to exhaustion requirement; although referring to claims of "technical exhaustion" at the state level, in *Galtieri v. Wainwright*, 582 F. 2d 348 (5th Cir. 1978), the same logic in determining the petition at hand exhausted applies. There are thousands of inmates who were affected adversely by the December 1992 decision by the Florida Department of Corrections to revoke all of their previously awarded provisional and administrative gaintime credits. Yet, over one year later, these inmates have struggled through a maze of adminis-

trative and judicial redress attempting to find a adequate remedy for their situation knowing all the time there wasn't one in the state administrative or judicial branch of government. It should appear of great concern to this court that so few of these affected inmates have even attempted redress. It is this petitioner's contention that this is due mainly to the confusing requirements necessary to begin such an arduous legal task.

Considering 1). the average educational level of these inmates, 2). the shortage of qualified law clerk (as few as 2 per a population of 1000) at some institution that are certified and further lack of experienced inmate clerks in the matter of procedural law and 3). the lack of pro bono or court appointed attorneys available to this petitioner and those similarly situated, this petitioner respectfully asks this court to consider a further exemption to the exhaustion requirement based upon Florida's voerly complicated, technical and time-consuming requirements for redress at the administrative and state levels.

Previous legal situations regarding the Florida Department of Corrections onerously changing awards of gain-time (i.e. *Waldrup v. Dugger*, supra; *Weaver v. Graham*, 450 U.S. 24 (1981); *Raske v. Martinez*, 876 F. 2d 1496 (11th Cir. 1989), took up to five years to resolve in the mechanically administered legal system, resulting in a decision in favor of the inmate petitioners, a mandamus being ordered against the Florida Department of Corrections for not complying timely with adjusting affected inmate's gaintime, and many inmates being "emergency released" because, after gaintime adjustment, they had been incarcerated beyond their actual release dates.

Petitioner seeks the avoidance of a repeat of this situation in the instant case. This is particularly important to this petitioner because his release date according to the law that awarded the gaintime has expired since October 1, 1992. *See Exhibit 1.*

GROUND TWO

The Petitioner petition this Honorable Court for atemporary restraining order and/or preliminary injunction to restore the revoked provisional credits, allow him to be eligible for further provisional credit awards and to restore his status of freedom with all privileges which were revoked as natural or actual consequences of the revoking of said release credits.

On October 1, 1992 the Petitioner was released from the custody of the Department of Corrections. On June 10, 1993 the Petitioner was reincarcerated in the Department of Correction, pursuant to an opinion by the Attorney General of the State of Florida, reinterpreting Florida Statute Section 944.277 and Florida Administrative 33-28.001 and thus making Petitioner and all other similarly situated inmates with murder charges ineligible for provisional release credits past and future. *See Exhibit 2.*

During this period of reclassification, Petitioner was ordered back to close custody institution, shackled, handcuffed and transported to Central Florida Reception Center. This reclassification was done on the Petitioner although he has EOS his sentence and the Department of Corrections didn't have anymore jurisdiction on his person.

In addition, classification at Central Florida Reception Center informed the Petitioner that all his accrued provisional release credits had been revoked thus altering his release date from October 1, 1992 to November 5, 1998. This now makes him ineligible for work release and other associated privileges and deprived him of his liberty.

Petitioner will also be ineligible for further provisional release credits which may be granted in the coming years depending upon population and overcrowding situation.

Petitioner is entitled to a temporary restraining order against the Respondent in this cause. A litigant may be

granted a temporary restraining order (TRO) by a federal court upon a showing that the Petitioner is in danger of immediate and irreparable injury, that the adverse party will not be substantially harmed if a (TRO) is granted, that the (TRO) is consistent with public interest and that the Petitioner has a strong likelihood of success in the lawsuit. *Murphy v. Society of Real Appraisers*, 388 F. Supp. 1046, 1049 (E.D. Wisc. 1975).

a. *Irreparable Injury*

The loss of constitutional rights, even for short period of time, constitute irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) & *Deerfield Medical Center v. City of Deerfield Beach*, 662 F. 2d 328, 338 (5th Cir. 1981).

Petitioner's due process constitutional rights as set forth in the United States Constitution, ex post facto clause will be violated by the revoking of provisional credits already granted and the reinterpretation of laws already in effect at the time of Petitioner's offense, thus adding time to a sentence he has already expired legally.

Petitioner's Eighth Amendment and any other applicable constitutional rights were clearly violated when he was reincarcerated and place back into the custody of the Department of Corrections pursuant to the aforementioned opinion.

It will take years for the Petitioner to complete all of the administrative and state level remedies before this issue will receive full redress from any court.

There is no other adequate remedy of law. The "grievance system of the Florida Department of Corrections has been certified by the Attorney General Office of the United States, thus requiring exhaustion of administrative remedies even before Petitioner can begin legal action within this court system. Petitioner is guaranteed to be turned down at all levels of the administrative and

state level, especially since the opinion/order came down from the Florida Attorney General Office in which they don't have any jurisdiction whatsoever to resolve or remedy this issue. It is an effort in futility until Petitioner can get a court hearing which is years away. This is his only avenue of recourse while he begins this process and later seek appropriate legal action.

The Petitioner has loss his liberty in violation of due process ex post facto constituting cruel and unusual punishment. Now separated from his family, love ones and friends in total violation of his United States Constitutional rights. In the meantime, irreparable and serious injury has being done and continue as long as he is in custody on a sentence he has legally completed in accordance to Florida's laws in existence at the time.

b. *Absence of harm to the adverse party*

The Respondent(s) have no legitimate interest in revoking the Petitioner's provisional credits and depriving him of his liberty without a court order.

The Respondent's main interest in revoking Petitioner's provisional credits is to quell public outcry over the early release of Donald McDugall. Violating the Petitioner's and many other similarly situated inmates constitutional rights to shift blame or buy time makes as much constitutional sense as arresting all the Black males in this country on the premise that since many will be in prison or on probation, the public will be safer if they're all locked up. Yes, crime rates would likely decrease, but $\frac{3}{4}$ of the Black men in this country would have their constitutional rights severely violated. Individual rights, no matter how disfranchised the group, are the basis of this country's political and legal foundation.

If I lose these credits, serve additional years in prison, lose my freedom and the income I could have been making, etc. and win on the merits two-three years from

now, I will never regain the loss and pecuniary damages will not be able to make up for it.

c. *Public Interest*

It is in the public interest that government official act in a lawful manner and not violate their own rules, regulation, statutes or the constitution. The Supreme Court has stated that injunctive relief should be "conditioned by the necessities of the public interest which (the rules, regulation or laws) . . . sought to protect." *Hecht Co. v. Rowles*, 321 U.S. 321, 330, 64 S. Ct. 587 (1944). The intent of government in passing its laws and requiring prison officials to comply with laws "is a public interest aspect which cannot be ignored." *Id* at 339-340.

All public officials and employees has taken an oath to support the Constitution of the United States and of the States of Florida, pursuant Florida Constitution Article II, Section 5 and Florida Statute Section 876.05.

On October 1, 1992, Respondent clearly violated Florida Statute Section 944.277 and Florida Administrative Code 33-28.001 when they revoked Petitioner's provisional release credits and deprived him of his liberty, and prohibit him from earning further credits toward release thereby increasing his prison sentence that has been expired.

It is in the public interest that the law of the land is followed and the law states that Petitioner should receive provisional release credits, past and future.

d. *Likelihood of ultimate success on the merits*

Petitioner likelihood of winning final judgment on the issue of his provisional release credits is overwhelming.

Repeatedly, the Department of Corrections and the State have been found to violate the ex post facto when the pass new rulings which adversely affect certain groups of inmates. Consequently, they have forced these inmates

to bide their time as the ever slower wheels of justice grind out a decision in the inmate's favor.

Florida Statute Section 944.277 and Administrative Code Section 33-28.001 created a liberty/vested interest, right and entitlement for the petitioner. The Supreme Court has held that state-created liberty interest may be found in "statutes or other rules." *Connecticut Board of Pardons v. Cunschat*, 452 U.S. 458, 101 S. Ct. 2460 (1981).

Most federal courts have held that a state regulation or directives is sufficient to create a liberty interest as well. *Parker v. Cook*, 642 F. 2d 865 (5th Cir. 1985) & *Gorham v. Hutto*, 667 F. 2d 1146 (4th Cir. 1981).

Petitioner concedes that not every statute or regulation creates a liberty interest but if a statute or regulation limits the discretion of state officials by providing that they may or must take some action only under certain prescribed circumstances, the statute or regulation creates a liberty interest or entitlement or right.

Thus, in *Greenhultz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S. Ct. 2100 (1979), the state parole provided that an eligible prisoner would be released *unless* the board found on of four disqualification applicable.

Florida Statute Section 944.277 (1988) specifically states: Thus, inmates with a second degree murder or attempted murder were eligible for provisional release credits "unless a sex act was attempted or completed during the commission of the offense."

In 1989, this statute was revised to disqualify those convicted of second degree murder or attempted murder committed or or after January 1, 1990. Petitioner's crime occurred _____. Note: As created by S. 4, Chapter 89-100, applicable to offenses committed on or after January 1, 1990. *Florida Statute Section 944.277 (1989)*.

Because this statute creates an expectancy of release unless one of certain prescribed conditions exist. The Supreme Court held that a protectable entitlement was created. *Id.* 44 U.S. at 11-12. See also *Hewitt v. Helms*, 103 S. Ct. 864, 871 (1983) ("the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the state has created a protected liberty interest.")

The State of Florida created further expectation of release through adoption of Florida Administrative Code Section 33-28.001 provisional credits:

(1) Eligibility. All incarcerated offenders, including those in the reception process, those in the custody of another agency and those in contracted facilities while actively serving a Florida sentence, who are earning incentive gain time and who are not otherwise ineligible as provided in subsection (2) shall be awarded provisional release credits.

(2) Ineligibility. No inmates shall be eligible to receive provisional release credits if the crime was committed on or after January 1, 1990 and wither the current or a previous conviction was for committing or attempting to commit murder in the First, Second, or third degree under § 782.04(1)(2)(3) or (4), of Florida Statute or has ever been convicted of any degree of murder in another jurisdiction.

The Petitioner submits that he and the Florida Department of Corrections both had an expectation of his release, because he was eventually released on it with according privileges as clearly stipulated in accordance with state law.

The Petitioner anticipate that the state will not only argue that he has no vested or liberty interest in receiving provisional release credits, but that this is due to the fact it is discreionary and seperate and appart from incentive gain time or basic gain time. (See Florida Statute Section 944.275)

In reality, provisional release credits were laced more automatic and mandatory than incentive gain time and not quite as mandatory as basic gain time.

Provisional release credits are calculated off an inmates release date the same as incentive or basic gain time days off are calculated. The only difference is in the way the amount of time-off is arrived at. These are not apples and orange we're discussing here but merely the difference between golden delicious, granny and Washington reds. Although, provisional credits is the statutory language of this gain time, it is still known in the Department of Corrections as administrative gain time.

1. Provisional Release Credits (Administrative Gain Time) are awarded off all eligible inmate sentences when the prison population reaches 97.5% of the lawful capacity as defined in Florida Statute Section 944.096 (1989) (revised to 98% in Florida Statute Section 944.096 (1992)).

2. Basic Gain Time is awarded automatically off all eligible inmates sentences at the beginning of their incarceration. 10 days off for every 30 to be served ("1/3 off the top"). Florida Statute Section 944.275(4)(a).

3. Incentive Gain Time is awarded off all eligible inmate sentences where the inmate works to certain standards prescribed in Florida Statute Section 944.275 (b) and Administrative Code Section 33-11.

Release Credits or Gain Time . . . the terms may be different, but the concept is still the same. Both are protected vested or liberty interests. Both were established under the auspices of the Florida Legislature and the Petitioner is entitled to receive same. None is constitutionally required and a matter of keeping down inmate population and serving as a positive reinforcement for good behavior (even with provisional credits, a disciplinary report, prohibited earning provisional release credits (administrative gain time) for two (2) months).

GROUND THREE

Reinterpretation of Florida Statute Section 944.277 and Florida Administrative Code Section 33-28.001 constitutes unconstitutional ex post facto law as applied to Petitioner convicted of any murder offenses prior to January 1, 1990. "No State shall . . . pass any . . . ex post facto law . . ."

In *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960 (1981); *Raske v. Martinez*, 876 F.2d 1496 (11th Cir. 1989); *Knuck v. Wainwright*, 759 Fed. Rep. 856 (May 6, 1985) & *Waldrup v. Dugger*, 562 So. 2d 687 (Fla. 1990) are controlling in this case and uphold that when the Department of Corrections changes laws after an inmate's offense which make a sentence more onerous upon that inmate, an ex post facto violation has occurred.

If a new provisional constricts the inmate's opportunity to earn early release and thereby makes more onerous the punishment for crimes committed before its enactment, this result runs afoul of the prohibition against ex post facto laws *Weaver* 450 U.S. at 35-36, 101 S. Ct. at 968. This is obviously the case with the Petitioner who's sentence will not only be extended, but where the state actually took back provisional release credits already given him in 1987 and he was later released from prison and reincarcerated on the exact same conviction.

The courts in *Weaver* and *Raske* have both held that even if a rule is discretionary, or a matter of legislature grace, this characterization does not prevent an ex post facto violation occurring as applied to Petitioner in this cause.

Even a statute merely alters penal provisions accorded by the grace of the legislature, it violates the [ex post facto] if it is both retrospective and more onerous than the law in effect at the date of the offense". *Weaver*, 450 U.S. at 30-31, 101 S. Ct. at 965. Since there is no constitutional requirement to receive any gain-time at all

(thus no "vested interest" in the state's opinion) and the ex post facto clause has repeatedly been held applicable, there can be no distinction in the instant case.

The facts in *Weaver*, *Raske*, *Waldrup* and *Knucke* are nearly identical to the instant case and the Petitioner would like for this court to take judicial notice to this fact. The Respondent(s) are forcing inmates to bide their time while this matter is settled in court. They are deliberately sandbagging the issue with every major change of law (*Knucke*, 1985 regarding 1983 changes; *Weaver*, 1981 regarding 1978 changes & *Raske*, 1989 regarding 1983 changes), years have passed between the wrong and the "end of justice being served."

Petitioner contends that the Respondent(s) have shown "bad Faith" and a "deliberate indifference" toward his constitutional and legal rights in order to keep him in a state of bondage and servitude, to wait until the public calms down and years pass while this issue is settled for the Petitioner within conventional legal channels.

It is well established that a penal statute violates the ex post facto clause if after a crime has been committed, it increases the penalty attached to that crime. The United Supreme Court clearly established this principle in the early case of *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648 (1798, and has adhered to this basic definition ever since. E.g. *Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 963, 67 L. Ed. 2d 17 (1981) (citing *Calder*, 3 U.S. (3 Dall.) at 390).

The policy underlying this prohibition is "to assure that legislative Acts give fair warning of their effects and permit individuals to rely on their meaning until explicitly changed." *Id.*, 450 U.S. at 28-29, 101 S. Ct. at 963-64 (citing *Dobbert v. Florida*, 432 U.S. 282, 298, 97 S. Ct. 2290, 2300, 53 L. Ed. 2d 344 (1977); *Kring v. Missouri*, 107 U.S. 221, 229, 2 S. Ct. 443, 449, 27 L. Ed. 506 (1883); *Calder*, 3 U.S. (3 Dall.) at 396 (Patterson, J.); *The Federalist* No. 44 (J. Madison) & No. 84 (A.

Hamilton). Equally, the ex post facto clauses of the constitution "restrict[] governmental power by restraining arbitrary and potentially vindictive legislation." *Id.*, 450 U.S. at 29, 101 S. Ct. at 964 (citing *Malloy v. South Carolina*, 237 U.S. 180, 183, 35 S. Ct. 507, 508, 59 L. Ed. 905 (1915); *Kring*, 107 U.S. at 229, 2 S. Ct. at 449; *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138, 3 L. Ed. 162 (1810); *Calder*, 3 U.S. (3 Dall.) at 396.

A retroactive law, however, is not ex post facto unless two critical elements are present: The law must apply to events occurring before its enactment, and it must disadvantage the offender. *Id.* (Citing *Lindsey v. Washington*, 301 U.S. 397, 401, 57 S. Ct. 797, 799, 81, L. Ed. 1182 (1937); *Calder*, 3 U.S. (3 Dall.) at 390.

In *Harris v. Wainwright*, 376 So. 2d 856 (Fla. 1979), the court held that gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied. The United States Supreme Court in *Weaver* directly overruled *Harris*, finding that [c]ontrary to the reasoning of the Supreme Court of Florida, a law need not impair a "vested right" to violate the ex post facto prohibition . . . critical to relief under the Ex Post Facto Clause is not an individual's rights to less punishment, but the lack of fair notice and governmental restraint when the legislature increases the punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

The Eleventh Circuit has reached this conclusion in a recent case raising exactly the issue before this Court today. *Raske*, 876 F. 2d at 1499-1500. We agree with the Eleventh Circuit's analysis in *Raske* said the United States Supreme Court. Even "grace" of the legislature, once given cannot be rescinded retrospectively. The Florida Supreme Court agreed with the Department of Correc-

tions that gain time statutes do not create vested rights until gain time actually is awarded, subject to all other applicable statutory conditions. Therefore, the provisional release credits AKA (administrative gain time) has been admittedly confirmed to be a "vested right" by the Department of Corrections and Florida Supreme Court in this cause, once it has been awarded.

The Petitioner's provisional release credits (Administrative Gain Time) had been awarded and he had been discharged from the Department of Corrections under the applicable statutory conditions, entitle him to be released immediately.

Subsequently, if this Honorable Court requires the Department of Corrections to apply and reinstate the provisional release credits and release the Petitioner, the equal protection clauses of the state and federal constitutions require that Department of Corrections shall treat all other similarly situated inmates the same.

CONCLUSION

The temporary restraining order should be granted without further delay for notice of purpose because of the risk of loss of various constitutional and legal rights ultimately his freedom. Petitioner has placed a copy of these papers in the mail to each of the Respondents and has attached an affidavit herewith.

Even if this court finds that Petitioner is not entitled to a temporary restraining order, it should grant Petitioner a preliminary injunction after notice to the Respondents. Petitioner has gone ahead and served notice on same.

A preliminary injunction may be granted upon notice based on consideration of the same four factors discussed in this writ. *supra*. *Florida Medical Association, Inc. v. U.S. Dept. of HRS*, 601 F. 2d 199 (5th Cir. 1979). Petitioner incorporates that discussion by reference at this juncture.

WHEREFORE, the court should grant a temporary restraining order or in the alternative, a preliminary injunction directing the Respondent to:

1. Restore Petitioner's Provisional Release Credits.
2. Restore his eligibility for future Provisional Release Credits.
3. Restore his freedom by ordering he be released from the custody of the Department of Corrections immediately.
4. Any further actions this court deems necessary at this time.

Respectfully submitted,

/s/ Kenneth Lynce A-35-26-41
 KENNETH LYNCE #352641
 Tomoka Correctional Institution
 3950 Tiger Bay Road
 Daytona Beach, FL 32124

[Certificate of Service & Jurat Omitted in Printing]

Exhibit 1

FLORIDA DEPARTMENT OF CORRECTIONS
 OFFENDER EMPLOYMENT ID. CARD

[Doc Logo]

NAME: Kenneth Lynce

DC #352641

SIGNATURE: Kenneth Lynce

DOB: 11/27/58

RACE: Black SEX: Male

HEIGHT: 72"

WEIGHT: 200

HAIR: Baack

EYES: Brown

ISSUED: 10/01/92

LOCATION: Hendry C.I.

/s/ [Illegible]

Exhibit 2

[SEAL]

CENTRAL FLORIDA
RECEPTION CENTERGovernor
LAWTON CHILESSecretary
HARRY K. SINGLETARY, JR.Post Office Box 628040
Orlando, Florida 32862-8040
Telephone: (407) 282-3053
SunCom 369-1000

INMATE NAME Lynce, Kenneth

DC #352641
C-207L

NOTICE TO INMATE

1993 Legislation (effective June 17, 1993), provides that all awards of administrative gain-time under s. 944.276 and provisional credits under s. 944.277 are to be canceled for all inmates serving a sentence or combined sentences in the custody of the department, or serving a state sentence in the custody of another jurisdiction. Release dates of all inmates with 1 or more days of such awards shall be extended by the length of time equal to the number of days of administrative gain-time and provisional credits which were canceled.

Based on the foregoing, your overall tentative release date has been recalculated and is 5-29-98.

7-6-93

Date of Notification

/s/ B. Bryant
Classification Specialist

The original notice should be provided to the inmate with a copy retained in the institutional file and a copy forwarded to Central Records in Admission and Release.

When I came back from court in Sept. with no time lost my date was at 11-23-98. I been Inccaratted for over a year and it is in the 8 month of 1998.

[Filed Jan. 20, 1995]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 94-891-CIV-ORL-18

KENNETH LYNCE,
Petitioner,

v.

HAMILTON MATHIS, *et al.,*
Respondents.

**RESPONSE TO MAGISTRATE JUDGE'S ORDER OF
JANUARY 4, 1995**

Petitioner, KENNETH LYNCE, hereby responds to the Magistrate Judge's Order of January 4, 1994, requesting a statement of his position and further clarification of the issue before the Court. The Petitioner would state as follows:

1. That the Petitioner filed his Petition for Writ of Habeas Corpus on August 15, 1994, challenging the retroactive application of § 944.277(1)(i), Florida Statutes (Supp. 1992), as violative of the Ex Post Facto Clause, United States Constitution, Art. I, Sec. 10.

2. That the retroactive application of the Florida Statute revoked previously earned provisional gain time credits which caused the Petitioner to be reincarcerated on June 10, 1993. Petitioner was released from prison on October 1, 1992.

3. That since being reincarcerated, Petitioner has suffered and continues to suffer irreparable injury due to the unconstitutional action taken by the State of Florida.

4. That further review of this ex post facto claim in State Court would be futile in light of current binding Florida Supreme Court precedent. *Griffin v. Singletary*, 638 So.2d 500 (Fla. 1994).

5. That Petitioner demands the issuance of a writ of habeas corpus declaring § 944.277(1)(i), Florida Statutes (Supp. 1992) unconstitutional as applied to him and ordering his release immediately.

6. That on September 23, 1994, this Court ordered the State to file a response to the petition herein.

7. That an Order to Show Cause was issued on October 26, 1994, because the State failed to respond as directed.

8. That on November 7, 1994, the State requested an extension of time until December 7, 1994, to respond and the Court granted this request. Nothing was filed by Respondent.

9. That a status conference on January 4, 1995, provided the Respondent with the opportunity to orally express its objection to the petition, but the Respondent has yet to formally reply to the petition after the Court has given several extensions of time.

10. That the Petitioner has clearly set forth his position in his petition and demands an expedited ruling on the merits and immediately release from further imprisonment.

WHEREFORE, the Petitioner, KENNETH LYNCE, demands a writ of habeas corpus be issued for his release declaring the retroactive application of Florida Statute § 944.277(1)(i) unconstitutional as violative of the Ex Post Facto Clause of Art. I Sec. 10, U.S. Constitution.

DATED this 20th day of January, 1995.

H. JAY STEVENS
Federal Public Defender

By: /s/ Joel T. Remland
JOEL T. REMLAND
Assistant Federal Public Defender
FL Bar ID No. 169291
80 N. Hughey Avenue, Suite 417
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[Certificate of Service Omitted in Printing]

[Filed Mar. 6, 1995]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

[Title Omitted in Printing]

**RESPONDENT'S ANSWER TO PETITION FOR
WRIT OF HABEAS CORPUS AND RESPONSE TO
SHOW CAUSE ORDER ENTERED FEBRUARY 21**

Respondent, HARRY K. SINGLETARY, JR., as Secretary of the Florida Department of Corrections, responds to this Court's order entered February 21, 1995, and answers the petition for writ of habeas corpus. For the reasons set forth below, the petition should be dismissed.

Preliminary Statement

Petitioner, Kenneth Lynce, is an inmate in the custody of the Florida Department of Corrections, presently incarcerated at Tomoka Correctional Institution, in Daytona Beach, Florida. Petitioner was first received by the department in April 1986 to serve an overall term of 22 years for attempted first degree murder, among other crimes. (Exhibit A.) Through the accumulation of gain-time and the allocation of early release credits due to prison overcrowding in the form of administrative gain-time under former Florida Statutes 944.276 (1987) (335 days credited between February 1987 and June 1988) and provisional credits under former Florida Statutes Section 944.277 (1989) (1860 days between July 1988 and January 1991), Lynce was released from custody on October 1, 1992. (Exhibit A.)

Subsequent to this release, the Attorney General of Florida issued 1992 Op. Att'y Gen. Fla. 092-96 (Decem-

ber 29, 1992), in which the Attorney General indicated that the Department of Corrections had erroneously interpreted 1992 legislative amendments to Florida Statutes Section 944.277(1)(i) that excluded from eligibility for early release due to prison overcrowding a class of offenders involving crimes of murder or attempted murder. (Exhibit A.) According to the Attorney General, the reenactment of that provision during the 1992 legislative session mandated that all previous provisional credits allocated to this class of offenders be retroactively cancelled effective July 6, 1992. (*Id.*) The Attorney General also opined that the department had the authority to return to custody any prisoner who was mistakenly released as a result of the department's erroneous interpretation. (*Id.*) Therefore, the department issued a warrant for retaking prisoner on May 3, 1993; presented the warrant to the sentencing court in the Ninth Judicial Circuit where Lynce was convicted; and received an Order for Execution of Sentence Imposed and Retaking of Prisoner on May 17, 1993. (*Id.*) Lynce was returned to custody on June 8, 1993, based upon that order. (*Id.*)

Respondent notes that after his return to custody, Lynce received a new 4½ year sentence for possession of cocaine (Exhibit A); however, because Lynce's previous 22-year term has been reinstated, it controls his release date. As of the date of the preparation of the affidavit appearing as Exhibit A, which is November 29, 1994, Petitioner's tentative release date was calculated to be May 19, 1998.

Argument

I. Exhaustion of State Court Remedies

Petitioner has filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254.

Title 28 U.S.C. § 2254 provides, in part, that

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judge-

ment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise by any available procedure, the question presented.

28 U.S.C. § 2254(b), (c).

Principles of comity and federalism underlie the two-tier system of collateral review and the exhaustion requirement that has been codified in 28 U.S.C. § 2254 (b)-(c) (1976). *Thompson v. Wainwright*, 814 F.2d 1495, 1502 (11th Cir. 1983). A state prisoner is required to exhaust all constitutional claims within the state's judicial and administrative forums before presenting them in a federal habeas corpus proceeding. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973) (doctrine of exhaustion of state remedies as a prerequisite to federal habeas corpus action is a judicially crafted instrument); see also *Brown v. Estelle*, 530 F.2d 1280 (5th Cir. 1976); *Rose v. Lundy*, 455 U.S. 509, 522 (1982); *Ali v. The State of Florida*, 777 F.2d 1489, 1489-90 (11th Cir. 1985). The exhaustion requirement includes exhaustion of "all available state remedies," *Braden*, 410 U.S. at 491, requiring the petition to exhaust not only state judicial remedies, but also state administrative procedures.¹

¹ Respondent advises the Court that Petitioner has both administrative and state court remedies available to resolve the issues raised in the petition. First, the Florida Department of Corrections provides a grievance procedure to inmates through which

Petitioner concedes that he has not exhausted his state court remedies. Petitioner claims that such exhaustion would be futile. Respondent would agree if the only facts and legal issues in this cause were related to the retroactive cancellation of early release credits for prisoners in custody of the department at the time of the cancellation. See *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994); *Langley v. Singletary*, 19 Fla. L. Weekly S647 (Fla., December 8, 1994). However, Petitioner was not similarly situated to those prisoners in custody because he was released prior to the issuance of the Attorney General's opinion that indicated that the department had misinterpreted the 1992 amendments. Thus, Petitioner, unlike those petitioners whose claims were addressed by the Florida Supreme Court in *Griffin* and *Langley*, *supra*, may have additional claims relative to his return to custody which require specific factual determinations and interpretations of state law that have not been fully exhausted. Since Petitioner has failed to properly raise the issues presented in this proceeding in the courts of this state and since Respondent does not waive the exhaustion requirement, the petition must be dismissed. See *Thompson v. Wainwright*, 714 F.2d 1495 (11th Cir. 1983).

issues such as those raised by Petitioner may be administratively reviewed, addressed, and corrected, if appropriate. Fla. Admin. Code Ch. 33-29. If the inmate desires further review, he may file an extraordinary writ petition with the appropriate state circuit court. Art. V, § 5, Fla. Const.; Fla.R.Civ.P. 1.630; Fla.R.App.P. 9.100. Since writs of mandamus and habeas corpus are extraordinary remedies, exhaustion of administrative remedies is generally required prior to invoking the jurisdiction of the circuit court. See *Griggs v. Wainwright*, 473 So.2d 49 (Fla. 1st DCA 1985). Review of any circuit court decision may be secured by appeal to the appropriate district court of appeal. Art. V, § 4, Fla. Const.; Fla.R.App.P. 9.110. Review of the decision of a district court of appeal by the Court of Florida is only available in limited instances. Art. V, § 3, Fla. Const.; Fla.R.App.P. 9.110; 9.120; 9.125.

II. The Ex Post Facto Claim

In the event that this Court disagrees that exhaustion is futile, Respondent addresses the sole claim raised by the Petitioner—that is, the retroactive cancellation of early release credits previously allocated amounts to an ex post facto violation of law.²

* * * *

The framers of the Constitution considered the ex post facto prohibition so important that it appears twice—once in Article I, Section 9, forbidding the Congress from passing any ex post facto law, and again in Article I, Section 10, placing the same limitation upon the states. Early opinions of the Supreme Court have recognized that “ex post facto law” was a term of art with an established meaning at the time of the framing of the Constitution. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (opinion of Chase, J.); *id.* at 396 (opinion of Paterson, J.). In *Calder*, the seminal case in ex post facto analysis, Justice Chase noted that:

The prohibition, “that no state shall pass any *ex post facto* law,” necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing.

Id. at 390.

While taken literally, “ex post facto” could encompass any law passed “after the fact”, Justice Chase sought to clarify in *Calder* what laws, in his view, were implicated by the ex post facto clauses:

1st. Every law that makes an action done before the passing of the law, and which was innocent

² In addressing only the ex post facto claim, Respondent takes the position that Petitioner has waived consideration of any other claims which might be related to his return to custody. Appointed counsel has declined to file an amended petition which might include other claims, thus Petitioner is limited to the issue raised in his pro se petition.

when done, criminal; and punishes such action. 2d. Every law that aggravates a crime or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Id. at 390.

As is apparent from this definition, the constitutional prohibition on ex post facto laws applies to penal statutes which disadvantage the offender affected by them. *Calder*, 3 U.S. (3 Dall.) at 390-392; see also, *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). There is no doubt that one of the objectives underlying the ex post facto prohibition is to provide fair notice and to foster governmental restraint when a legislature increases punishment beyond what was prescribed when the crime was consummated. *Calder*, 3 U.S. (3 Dall.) at 387-388; *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810); *Dobbert v. Florida*, 432 U.S. 282, 298 (1977); *Weaver*, 450 U.S. at 28-29 (1981); *Miller v. Florida*, 482 U.S. 423 (1987).

However, the prohibitions of the ex post facto clauses do not extend to every change of law that "may work to the disadvantage of a defendant." *Dobbert*, 432 U.S. at 293.

It is intended to secure "substantial personal rights" from retroactive deprivation and does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance."

Portley v. Grossman, 444 U.S. 1311, 1312 (1980).

The critical question, as Florida has often acknowledged, is whether the new provision imposes greater

punishment after the commission of the offense, not merely whether it increases a criminal sentence.

Weaver, 450 U.S. at 32, n. 17 (citations omitted).

The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomfiting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation.

Paschal v. Wainwright, 738 F.2d 1173, 1176, n.4 (11th Cir. 1984), citing *United States v. Lovett*, 328 U.S. 303, 324 (1946).

The underlying purpose of the statutes now under ex post facto scrutiny is of critical importance in determining whether a statute is procedural or substantive, or indeed properly the subject of ex post facto analysis. Administrative gaintime and provisional credits were no more than mechanisms for reducing the prison population for the administrative convenience of the Department of Corrections—these statutes do not address the substantive matters concerning punishment or reward. See *Blankenship v. Dugger*, 521 So. 2d at 1098; *Dugger*, 584 So. 2d at 2.

Like the term "ex post facto", the term "procedural" requires some explanation. While the earlier decisions of the United States Supreme Court describing "procedural" changes have not explicitly defined what is meant by the term, the Supreme Court has recently expounded upon and limited the scope of the definition in *Collins v. Youngblood*, 497 U.S. 37 (1990).³

In *Youngblood*, the Supreme Court acknowledged that previous decisions of the court held that:

³ In declining to expand the scope of the ex post facto clauses, the Supreme Court has receded from its earlier decisions in *Kring v. Missouri*, 107 U.S. 221 (1883) and *Thompson v. Utah*, 170 U.S. 343 (1898).

[A] procedural change may constitute an ex post facto violation if it 'affect[s] matters of substance,' *Beazell, supra*, at 171, 70 L.Ed 216, 46 S.Ct. 68, by depriving a defendant of 'substantial protections with which the existing law surrounds the person accused of crime,' *Duncan v. Missouri*, 152 U.S. 377, 382-283, 38 L.Ed. 485, 14 S.Ct. 570 (1894), or arbitrarily infringing upon 'substantial personal rights.' *Malloy v. South Carolina*, 237 U.S. 180, 183, 59 L.Ed. 905, 35 S.Ct. 507 (1915); *Beazell, supra*, at 171, 70 L.Ed 216, 46 S.Ct. 68.

Youngblood, 497 U.S. at 45.

However, the *Youngblood* court went on to hold that "the references in *Duncan* and *Malloy* to 'substantial protections' and 'personal rights' should not be read to adopt without explanation an undefined enlargement of the Ex Post Facto Clause." *Youngblood*, 497 U.S. at 46.

In announcing its decision in *Youngblood*, the Supreme Court specifically receded from its earlier decision in *Kring v. Missouri*, 107 U.S. 221 (1883):

The Court's departure [in *Kring*] from Calder's explanation of the original understanding of the Ex Post Facto Clause was, we think, unjustified.

Youngblood, 497 U.S. at 49.

In *Kring*, the Supreme Court had defined an ex post facto law as:

[O]ne which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or, in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage.

Kring, 107 U.S. at 228-229 (quoting *United States v. Hall*, 26 F. Case 84 86 (No. 15,285) (D. Pa. 1809) (emphasis added)).

The Supreme Court has now made clear that shifting the focus of ex post facto analysis from the original understanding of the ex post facto clause is impermissible and that the language cited in *Kring* was never intended "to mean that the Constitution prohibits retrospective laws, other than those encompassed by the Calder categories, which 'alter the situation of a party to his disadvantage.'" *Youngblood*, 491 U.S. at 49-50.

The holding in *Kring* can only be justified if the Ex Post Facto Clause is thought to include not merely the Calder categories, but any change which "alters the situation of a party to his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases. We accordingly overrule *Kring*.

Id. at 50.

Similarly, in receding from its decision in *Thompson v. Utah*, 170 U.S. 343 (1898), the Supreme Court noted:

The right to jury trial provided by the Sixth Amendment is obviously a "substantial" one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the Ex Post Facto Clause. To the extent that *Thompson v. Utah* rested on the Ex Post Facto Clause and not the Sixth Amendment, we overrule it.

Youngblood, 497 U.S. at 51-52 (Stevens, Brennan, and Marshall, concurring).

Petitioner contends that his later exclusion from early release eligibility through retroactive cancellation of his credits is ex post facto merely because he will be required to serve a longer portion of his sentence. Under *Youngblood*, the question of whether a prisoner is disadvantaged by being required to serve most if not all of his original sentence falls short of providing a full answer

when conducting an ex post facto analysis. The fact that Petitioner may feel disadvantaged by being excluded from early release prompted by prison overcrowding, when considered alone, is insufficient to trigger the prohibitions of the ex post facto clause. Petitioner must also show that the State's procedural mechanism to relieve prison overcrowding through early release credits creates a "substantial personal right" related to the definition of crimes, defenses, or punishments. Obviously, these statutes do not retroactively create new criminal offenses nor do they deprive a defendant of defenses. Thus the sole question is whether Florida's early release statutes "change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) at 390.

The Supreme Court has also given guidance in determining whether a statute is punitive or penal in nature. In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), the Court described the standards traditionally applied to determine whether a statute is punitive or penal in nature:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id. (citations omitted).

The underlying purpose of the early release statutes thus becomes of critical importance in determining whether the statutes are procedural or substantive in nature, or

whether they operate to increase the "quantum of punishment" merely because they afford early release from a sentence already imposed. There can be no dispute that the sole purpose of the early release statutes is to provide a mechanism to alleviate prison overcrowding. The statutes were not designed nor enacted to promote the traditional aims of punishment—that is, retribution and deterrence. The statutes were enacted to address the singular problem of overcrowding—they were never intended to operate as an incentive to reduced imprisonment or to become a consideration in the sentencing forum.

Petitioner apparently believes that early release credits are the equivalent to the basic gaintime addressed in *Weaver v. Graham*, 450 U.S. at 24 and the incentive gaintime addressed in *Raske v. Martinez*, 876 F.2d 1496 (11th Cir. 1989) and *Waldrup v. Dugger*, 562 So. 2d 687 (Fla. 1990). However, the similarities are limited to the nomenclature. Both basic and incentive gaintime relate to the sentence imposed, and a release date reduced by these awards can be reasonably predicted, based upon length of the term meted out. Basic gaintime is applied as a lump sum award to reduce the overall length of sentence the day the prisoner enters the prison gates. While not necessarily a part of the sentence in a technical sense, the award of basic gaintime is a quantifiable determinant of a prisoner's overall term, which, as the Supreme Court recognized in *Weaver*, may operate as a "factor . . . [in] the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." Similarly, the potential to earn incentive gaintime for labor performed and constructive activities, although contingent upon performance and good behavior, is also quantifiable based upon length of sentence imposed. Thus, to the extent that these two types of "gaintime" operate in tandem with the length of sentences imposed, they affect the "quantum of punishment" which attaches at the time the crime is committed. Conversely, the eligibility and receipt by a prisoner of early release awards, whether those

awards are called "gaintime", "credits", "allotments", etc., is in no way tied to overall length of sentence. The need for and application of such awards are contingent upon many outside variables which contribute to prison overcrowding. There is no relationship to the original penalty assigned to the crime at the time it was committed nor to the ultimate punishment meted out.⁴ The sole purpose of the early release statutes is to provide a temporary mechanism to alleviate the administrative crisis created by prison overcrowding while continuing to protect the public from violent offenders. The statutes are procedural in nature—their purpose directed to alleviating the administrative crisis of prison overcrowding not to the traditional purposes of punishment. Consequently, Florida's early release statutes create no "substantial personal rights" relating directly to the definition of crimes, defenses, or punishments, as defined and limited by the Supreme Court's decision in *Youngblood*.

It is most important to note that the Eleventh Circuit Court of Appeals as well as the various federal district courts in Florida, have concurred with the decisions of the Florida Supreme Court in *Blankenship* and *Rodrick*, *supra*, in its holdings that these statutes are administrative and procedural in nature and not subject to ex post facto proscriptions.⁵ More recently, this Court has addressed

⁴ The Florida Supreme Court has recently made clear in the sentencing context that early release credits are not a valid consideration in the sentencing process. See *Griffin v. Singletary*, 19 Fla. L. Weekly S273 (Fla. May 19, 1994) (original opinion 19 Fla. L. Weekly S94a, February 24, 1994) (provisional [credits] in no sense [are] tied to any aspect of the original sentence and cannot possibly be a factor at sentencing or in deciding to enter into a plea bargain); *Tripp v. State*, 622 So. 2d 941 (1993) (the trial court may not direct credit for administrative gaintime or provisional credits on a prior probationary split sentence or a sentence structure affected by the *Tripp* decision).

⁵ See *Petrone v. Dugger*, Case No. 88-12041-Civ-Atkins, USDC-Southern District, entered August 8, 1988, *aff'd* Case No. 88-6061 (11th Cir., August 29, 1989); see also *Manzanero v. Dugger*, Case

the specific issue at bar here—that is, the retroactive cancellation of provisional credits and administrative gaintime previously allocated to alleviate prison overcrowding. The decision in *Joseph C. Magnotti v. Harry K. Singletary*, Case No. 93-8554-Civ-Moreno, USDC—Southern District, rendered on March 24, 1994, cites with approval the recent decision of the Florida Supreme Court in this case: *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994). *Griffin*, like the predecessor decisions in *Rodrick*, *Grant*, and *Blankenship*, *supra*, makes clear that the "Florida Legislature did not intend to confer an expectation upon Florida Inmates such as the petitioner that early release credits would continue to be applied to shorten their sentences . . . [t]he provisional credits in § 944.277 were contemplated not as a prisoner entitlement but merely as an escape valve which would be triggered only by the need to alleviate overcrowding in the state prison system." *Magnotti* at 6. Ultimately, this Court has concluded that the retroactive cancellation of early release credits allocated specifically for the purpose of alleviating prison overcrowding does not offend the due process, equal protection, or ex post facto clauses of the Constitution.

Recently, the Eleventh Circuit has held that Florida's control release statute, Section 947.146, Florida Statutes,

No. 88-6076-Civ-Scott, USDC-Southern District, judgment entered September 29, 1988; *Aman v. Martinez*, Case No. 88-50124-RV, USDC-Northern District, judgment entered May 8, 1989; *Stafford v. Dugger*, Case No. 89-295-Civ-J-16, USDC-Middle District, judgment entered July 10, 1990; *Tommy Williams, Sr. v. Dugger*, Case No. 90-602-Civ-T-3A98(A), USDC-Middle District, judgment entered June 7, 1991; *Edgar Searcy v. Singletary*, Case No. 91-1071-Civ-T-23C, USDC-Middle District, report and recommendation entered August 31, 1993.

It is especially important to note that Circuit Judge Tjoflat, who authored the opinion in *Raske* in July 1989, was also a member of the panel who entered the decision in *Petrone*, just one month later in August 1989. Thus, it is clear that the federal appellate court considered the two decisions distinguishable.

does not affect punishment and therefore does not violate the ex post facto clause. *Hock v. Singletary*, 8 Fla. L. Weekly Fed. C943 (11th Cir., January 9, 1995). While *Hock* dealt with the eligibility of an inmate for the control release program due to the nature of his offense, the Eleventh Circuit clearly addressed the nature of early release credits in finding that early release statutes are "procedural in nature and are not directed toward the traditional purposes of punishment." *Id.* (citing *Dugger v. Rodrick*, 584 So. 2d 2, 4 (Fla. 1991)).

For the reasons cited above, Respondent submits that the repeal of the early release statutes and simultaneous cancellation of all early release balances do not violate the prohibition against ex post facto laws. The petition must therefore be denied.

III. Response to Court's Order to Show Cause of February 21

The Court entered an order on February 21, 1995, giving Respondent eleven days to respond to the order to show cause stating why the relief requested in the petition should not be granted and why sanctions should not be imposed for failure to respond timely.

First, undersigned counsel does not recollect that a time frame for response by the Respondent was determined at the hearing on January 4. Rather, undersigned counsel recollects and her notes reflect that counsel for the petitioner was given until the end of January to file an amended petition if he so desired. No written order reflecting any ruling of the Court was entered to counsel's knowledge after the hearing on January 4. Apparently, undersigned counsel has incorrectly recollected the rulings at hearing.

As explained at hearing on January 4, counsel did not earlier file a written response because of the appointment of counsel by the Court and the anticipation of an

amended petition by appointed counsel in substitution for the pro se petition by inmate Lynce.⁶ The Court acknowledged at hearing that the legal arguments of the Florida Department of Corrections were known since the department had previously filed a substantive response in the case of *Barr v. Singletary*, Case No. 93-667-Civ-Orl-22 and in the companion case at hearing on January 4, *Darryl v. Singletary*. As pointed out by counsel for Respondent, the arguments relative to the ex post facto issues were the same for all cases; however, counsel for Respondent also pointed out that Petitioner Lynce's case differed in that he was a former prisoner returned to custody as a result of the department's misinterpretation of 1992 legislative amendments to Florida Statutes Section 944.277. *See* 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992). Instead of amending the petition, appointed counsel filed a response simply claiming that since no response had been filed by the Respondent, Petitioner was entitled to an expedited ruling on the merits. In the absence of a response, petitioner would be entitled to a ruling on the merits; he is not entitled to a grant of the petition by default. *See, e.g., Bermudez v. Reid*, 733 F.2d 18, 21 (2d Cir. 1984). If courts were to "enter default judgments without reaching the merits of the claim, it would be not the defaulting party but the public at large that would be made to suffer" *Id.*; *see also, Aziz v. Leferve*, 830 F.2d 184, 187 (11th Cir. 1987) (default judgment not contemplated in habeas corpus cases); *Stines v. Martin*, 849 F.2d 1323 (10th Cir. 1988).

A request for dismissal based upon exhaustion questions along with a substantive response to the ex post facto claim have been filed. Under the circumstances outlined above, undersigned counsel does not believe that

⁶ Prior to the appointment of counsel, undersigned counsel requested an extension of time when paperwork related to this case was forwarded to her in early November by the Office of Attorney General.

sanctionable conduct has occurred. Accordingly, she respectfully requests that the response be accepted and the show cause order be discharged.

Respectfully submitted,

/s/ Susan A. Maher
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[Certificate of Service Omitted in Printing]

EXHIBIT A

[DoC Logo]

FLORIDA
 DEPARTMENT OF
 CORRECTIONS

Governor
 LAWTON CHILES

Secretary

An Affirmative Action/
 Equal Opportunity Employer

HARRY K. SINGLETARY, JR.

2601 Blair Stone Road • Tallahassee, FL 32399-2500

AFFIDAVIT

COUNTY OF LEON

Personally appeared before me this day Bobbie Glover, who being duly sworn deposes and says that:

She is the Bureau Chief of Admission and Release of the Department of Corrections and as such Bureau Chief she is the official custodian of all inmate records pertaining thereto:

Kenneth Lynce, DC #352641, a/k/a Kenneth Russell Lynce was received by the Florida Department of Corrections on April 23, 1986, having been sentenced in the Circuit Court of Orange County, for the following:

Case Number: CR85-3760, imposed January 27, 1986

Term: Three and one-half (3½) years less credit for 44 days time served prior to sentencing, to run concurrent with case number CR85-5152.

Offense: Delivery of Cocaine a Controlled Substance

Case Number: CR85-5152, two counts, imposed January 27, 1986

Term: Three and one-half (3½) years less 29 days credit for time served prior to sentencing as to each count; each count to run concurrent to the other and concurrent with case number CR85-3760.

Offense: Count One—Delivery of Cocaine a Controlled Substance

Count Two—Possession of Cocaine a Controlled Substance

Case Number: CR85-6173, three counts, imposed April 14, 1986

Term: Twenty-two (22) years less credit for 170 days time served prior to sentencing; each count concurrent to the other and concurrent to case numbers CR85-5152 and CR85-3760.

Offense: Count Two—Armed Burglary of Dwelling
Count Three—Attempted First Degree Murder

Count Four—Possession of a Firearm in Commission of a Felony

Through the accumulation of gain-time as provided for in Florida Statute 944.275 as well as the application of 335 days of administrative gain-time (credited between February 1987 and June 1988) and 1,860 days of provisional credits (credited between July 1988 and January 1991), inmate Lynce was released from custody on October 1, 1992, as his release date was calculated as follows based on the sentence imposed in case number CR85-6173:

DATE SENTENCE BEGAN	04-14-1986
Twenty-two (22) Years in Days:	+ 8030
Jail Credits:	— 170
MAXIMUM RELEASE DATE	10-21-2007
Basic Gain-time Awarded Pursuant to Section 944.275, Florida Statutes:	— 2640
Additional Gain-time Awarded:	— 958
Administrative Gain-time Awarded Pursuant to Section 944.276, Florida Statutes:	— 335
Gain-time Forfeited Due to Disciplinary Action:	+ 295
TENTATIVE RELEASE DATE	11-04-1997
Provisional Credits Awarded Pursuant to Section 944.277, Florida Statutes:	— 1860
PROVISIONAL RELEASE DATE	10-01-1992

Subsequent to this release, Attorney General Opinion 92-96, dated December 29, 1992, and clarified on December 31, 1992, was issued indicating the method of release date calculation utilized by the Department was in error due to legislative action amending section 944.277, effective July 6, 1992, which authorized the retroactive cancellation of credits previously awarded to inmates now excluded by subsection 944.277(1)(i). Pursuant to that opinion and its clarification, the department recalculated inmate Lynce's release date cancelling all provisional credits (1,860 days) previously awarded and issued an *Affidavit for Retaking Prisoner* on May 3, 1993. This affidavit was presented to the sentencing court in the Ninth Judicial Circuit in and for Orange County, Florida which sentenced inmate Lynce in case number CR85-6173, count three. The sentencing court issued an *Order for Execution of Sentence Imposed and Retaking of Prisoner* on May 17, 1993. Inmate Lynce was returned to the Department's custody on June 8, 1993, based on the May 17, 1993 order.

On July 5, 1993, inmate Lynce was release to the custody of Orange County officials for an outside court appearance.

Inmate Lynce was returned to the Department's custody on September 21, 1993, after sentencing in the Circuit Court of Orange County on July 7, 1993, for the following:

Case Number: CR92-12809

Term: Four and one-half (4½) years less credit for 39 days time served prior to sentencing to run concurrent with any active sentence.

Offense: Count Two—Possession of Cocaine

As a result of new legislation effective June 17, 1993, (Section 944.278), all administrative gain-time (335 days) previously awarded inmate Lynce under Section 944.276, Florida Statutes was also cancelled.

Inmate Lynce's maximum and tentative release dates are currently calculated based on the sentence imposed in case number CR85-6173, as follows:

DATE SENTENCE BEGAN		04/14/1986
Twenty-two (22) Year Sentence in Days:	+	8030
Jail Credits:	-	170
MAXIMUM RELEASE DATE		10/21/2007
Basic Gain-time Awarded Pursuant to		
Section 944.275, Florida Statutes:	-	2640
Additional Gain-time Awarded:	-	1157
Administrative Gain-time Awarded Pursuant		
to Section 944.276, Florida Statutes:	-	335
Administrative Gain-time Cancelled Pursuant		
to Section 944.278, Florida Statutes:	+	335
Gain-time Forfeited Due to Disciplinary		
Action:	+	355
TENTATIVE RELEASE DATE		05/19/1998
Provisional Credits Awarded Pursuant to		
Section 944.277, Florida Statutes:	-	1360
Provisional Credits Cancelled Pursuant to		
Opinion 92-96, Attorney General:	+	1360
RE-ESTABLISHED TENTATIVE		
RELEASE DATE:		05/19/1998

The facts stated in the foregoing affidavit are based on information contained in the official files of the Department of Corrections.

/s/ Bobbie Glover
BOBBIE GLOVER
Bureau Chief
Admission and Release Authority
Department of Corrections

[Jurat Omitted in Printing]

[Filed Mar. 14, 1995]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

[Title Omitted in Printing]

REPORT AND RECOMMENDATION
TO THE UNITED STATES DISTRICT COURT

I. Status

Petitioner initiated this action for habeas corpus relief pursuant to 28 U.S.C. § 2254 on August 18, 1994 (Doc. No. 1). Upon consideration of the petition, the Court ordered Respondents to show cause why the relief sought in the petition should not be granted. Respondents filed a reply to the petition in accordance with the Court's instructions and Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (Doc. No. 22, filed March 6, 1995). Petitioner alleged only one claim for relief, that the State's retroactive application of its provisional release credits statute was an *ex post facto* law in violation of Article I, Section 10 of the United States Constitution.

II. Factual Background

Petitioner was convicted of attempted first-degree murder, armed burglary, and possession of a firearm in the commission of a felony on April 14, 1986. He was sentenced to a term of twenty two years imprisonment. Under the State's provisional release credit statute in force at that time, he was eligible to accumulate credits to shorten

his period of incarceration. Fla. Stat. ch. 944.277 (1989). The provisional credits were only to be awarded during periods when the prisoner population of the correctional system approached full capacity, and then only to inmates not convicted of certain enumerated offenses or serving a mandatory minimum sentence. Fla. Stat. ch. 944.277(1) (1989).

From the time of his sentencing to January 1991, Petitioner accumulated 1860 days of provisional release credits. During the 1992 session, the Florida Legislature amended the provisional release credit statute to exclude the award of credits to prisoners convicted of attempted murder. Fla.Stat. ch. 944.277(1) (1992 Supp.). Petitioner's provisional release date, hastened by the 1860 days of credit previously awarded, was therefore set at October 1, 1992. On that date, Petitioner was released from custody.

On December 29, 1992, Robert Butterworth, Attorney General of the State of Florida, issued an opinion interpreting the 1992 amendment of Fla.Stat. ch. 944.277. 92 Op. Att'y Gen. 96 (1992). He found that the provisional release credit statute was adopted as a permissive administrative means for relieving prison overcrowding. He also found that a footnote which had restricted previous amendments to Fla.Stat. ch. 944.277 to prospective effect was not included in the 1992 amendment. He therefore concluded that the 1992 amendment was intended to have retroactive effect, which he believed precluded the award of any provisional release credits to a prisoner convicted of murder.

Harry Singletary, Jr., Secretary of the Florida Department of Corrections, solicited a further opinion from the Attorney General on the interpretation of the amended provisional release statute. On December 31, 1992, the Attorney General clarified his previous opinion and suggested that provisional release credits awarded before the

1992 amendment of Fla.Stat. ch. 944.277 to inmates convicted of murder should be withdrawn. He also found that, while no court decision compelled the Department of Corrections to recommit previously released prisoners, the department could do so at its own discretion.

Petitioner's provisional release credits were cancelled on January 4, 1993. The Department of Corrections submitted an Affidavit for Retaking Prisoner to the Ninth Judicial Circuit Court on May 3, 1993. On May 17, 1993, the Court issued an Order for Execution of Sentence Imposed and Retaking of Prisoner. Petitioner was returned to incarceration on June 8, 1993. His prior release date of October 1, 1992 was cancelled and his tentative release date was delayed until May 19, 1998.

III. Findings of Fact and Conclusions of Law

Petitioner contends that the cancellation of his accumulated provisional release credits pursuant to the 1992 amendment of Fla.Stat. ch. 944.277, which caused a significant delay in his tentative release date, is an *ex post facto* law in violation of Article I, Section 10 of the United States Constitution. Respondents contend that provisional release credits were an administrative tool to reduce prison overcrowding, not a mitigation of punishment. They also contend that the statute was merely procedural and therefore did not affect the magnitude of punishment imposed for conviction of an offense.

Article I, Section 10 of the United States Constitution states, "No State shall . . . pass any . . . ex post facto Law." U.S. Const. art. I, § 10, cl. 1. The Framers intended the *ex post facto* clause to be a safeguard for the public which would force criminal legislation to provide fair warning of its effects and permit reliance until explicitly changed. *Weaver v. Graham*, 450 U.S. 24, 28 (1981). The prohibition extends to any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes addi-

tional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. at 28 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26 (1867)). Two elements are required for a criminal or penal law to be considered *ex post facto*: it must apply to events occurring before its enactment and it must disadvantage the offender it affects. *Id.* at 29; *Lindsay v. Washington*, 301 U.S. 397, 401 (1937). However, legislation which satisfied both requirements would not violate the *ex post facto* prohibition if the change it effected were merely procedural and did "not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." *Hopt v. Utah*, 110 U.S. 574, 590 (1884); *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

In *Weaver v. Graham*, 450 U.S. 24, 67 L.Ed.2d 17 (1981), the Supreme Court held unconstitutional the application of the amended Florida good time gain-time statute to inmates convicted before the effective date of the statute. The amendment decreased the number of days of gain-time that an inmate could earn per month for good behavior. See Fla.Stat. ch. 944.27(1) (1975), Fla.Stat. ch. 944.275(1) (1979). Although previously awarded gain-time was not cancelled or reduced, the new gain-time statute was applied to all inmates in the prison system, including those convicted before the enactment of the amendment. The State of Florida advanced three arguments suggesting that the law was not *ex post facto*: first, it did not impair vested rights; second, on its face, it applied only prospectively; and third, it did not worsen the conditions of incarceration.

The Court rejected the first argument out of hand; vested rights have never been a requirement for protection under the *ex post facto* clause, only under the contracts clause and the due process clause. *Weaver*, 450 U.S. at 29. As to the second argument, even though the amendment was prospective in form, it was retrospective in effect. "The critical question is whether the law

changes the legal consequences of acts completed before its effective date." *Id.* at 31. Prisoners incarcerated for previous conduct would have greater consequences attached to those prior acts, and the law was therefore retrospective. The application to earlier offenders was repugnant to the original meaning of the *ex post facto* clause because an inmate who considered gain-time before entering a guilty plea would have calculated and relied upon a shorter sentence under the then existing statute. *Id.* at 32. Finally, the Court addressed whether the amendment placed the prisoner in a worse position than the prior law. Because a prisoner had less opportunity to shorten his sentence, he would have been materially harmed by the change. *Id.* at 33. The Court did not consider Florida's argument that the alteration was merely procedural, for it substantively changed the gain-time available, not merely the method by which it was assigned.

The Eleventh Circuit turned to the issue of gain-time after Florida again altered the formula for its award. In *Raske v. Martinez*, 876 F.2d 1496 (11th Cir. 1989), *cert. denied*, 493 U.S. 993 (1989), the Court held unconstitutional a decrease of the opportunity to earn incentive gain-time. The amended statute provided for increased good behavior gain-time but decreased the amount of incentive gain-time that could be earned by diligent labor. See Fla.Stat. 944.275 (1982), Fla.Stat. ch. 944.275 (1983). The net effect for an inmate who labored diligently was a decrease in available gain-time. The State of Florida made three closely related arguments as to why the statute was not *ex post facto*: first, the granting of incentive gain-time was discretionary, while the granting of good behavior gain-time was automatic; second, the granting of incentive gain-time was discretionary because the duties which allowed an inmate to earn it were a matter of legislative grace; and third, the increase in good behavior gain-time offset the decrease in incentive gain-time.

The Court found that although an inmate had no *right* to gain-time, either good behavior or incentive, the *ex post facto* clause has never required a vested right to be impaired to violate the clause. *Raske*, 876 F.2d at 1499 n.5. In fact, the Court found that both incentive gain-time and good behavior gain-time, which was held subject to the prohibition in *Weaver*, were discretionary. *Id.* Not only did the State have discretion in determining whether good behavior or incentive gain-time would be awarded, it used similar criteria in making the decision. There was therefore no distinction between the two insofar as the *ex post facto* clause was concerned, so the reasoning of *Weaver* applied to incentive gain-time. *Id.* While the work an inmate performed to earn incentive gain-time may have been a matter of legislative grace, if the State afforded the inmate the opportunity to work, it was bound to reward the prisoner for his services with at least as much gain-time as he would have earned at the time of his offense. *Id.* at 1500. Finally, although an inmate might not earn the maximum award of incentive gain-time (and was eligible to earn more good behavior gain-time under the new statute), the denial of the opportunity to do so made the punishment for the prisoner's offense more onerous than when the offense was committed.

In *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995), the Eleventh Circuit addressed the 1989 amendment of Florida's control release statute, Fla.Stat. ch. 947.146 (1989). The goal of the control release program, like that of provisional release credits, was to ease the overcrowding of the state correctional system. The 1989 amendment of the control release statute transferred responsibility for control of the prison population from the Florida Department of Corrections to the Florida Parole Commission and altered prisoner eligibility. Prior to the amendment, prisoners convicted of murder were eligible for control release; after the amendment, they were not.

The Court, reasoning in summary fashion, found that "any disadvantage suffered by the petitioner does not affect punishment and therefore does not violate the Ex Post Facto Clause." *Hock*, 41 F.3d at 1472. In contrast with the alterations in the good behavior gain-time statutes which had been held unconstitutional in *Weaver* and *Raske*, it found that the control release statute was procedural, not substantive. *Id.* The Court agreed with the Florida Supreme Court's interpretation of the *ex post facto* clause, in which it had earlier held that Fla.Stat. ch. 944.277 "was procedural in nature, [and] not directed toward the traditional purposes of punishment." *Dugger v. Roderick*, 584 So.2d 2 (Fla. 1991), *cert. denied sub nom. Roderick v. Singletary*, —U.S.—, 116 L.Ed.2d 790 (1992). It therefore held that retroactive application of the amendment did not run afoul of the *ex post facto* clause.

The Eleventh Circuit then stated that the amendment to the control release statute, unlike changes in good behavior and incentive gain-time statutes, did not deny inmates the ability to reduce their terms of confinement. *Hock*, 41 F.3d at 1472. The control release statute permitted release based upon prison system overcrowding, not diligent inmate labor and good behavior. The former was independent of an prisoner's labors, the latter the fruit of it. The Court also held that good behavior gain time could be predicted and accounted for in entering into a plea bargain and sentencing but control release could not. *Id.* at 1473.

Although the Eleventh Circuit's opinion is sparsely reasoned, it resolves the issues at question. Provisional release credits were merely an earlier alternative to control release as a means to relieve prison overcrowding. In fact, *Roderick*, the Florida case upon which the Eleventh Circuit relies heavily, dealt with provisional release credits, not control release. Therefore, in all likelihood, were the Eleventh Circuit to have faced the issue of provisional release credits under Fla.Stat. ch. 944.277

instead of the control release statute, it would have held the 1992 amendment not to violate the *ex post facto* clause. Accordingly, the undersigned respectfully recommends that the Petition for Writ of Habeas Corpus filed herein be DENIED and that the case be DISMISSED with prejudice.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended in Orlando, Florida on March 14, 1995.

/s/ David A. Baker
DAVID A. BAKER
United States Magistrate Judge

[Filed Apr. 24, 1995]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

[Title Omitted in Printing]

**PETITIONER'S OBJECTION TO
REPORT AND RECOMMENDATION**

The Petitioner, KENNETH LYNCE, hereby objects to the Report and Recommendation of the United States Magistrate Judge filed on March 14, 1995.

Status

Petitioner filed this habeas corpus action, pursuant to 28 U.S.C. § 2254, on August 18, 1994. Respondents filed their reply on March 6, 1995. The sole claim for relief is based on the State's retroactive application of its provisional release credits statute. § 944.277, Fla.Stat. (1991). On March 14, 1995, the United States Magistrate Judge filed a Report and Recommendation which recommended the Petition be denied and the case be dismissed with prejudice.

Objections

The Report and Recommendation primarily relies on *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995). In that case, the Eleventh Circuit held the control release statute, § 947.146 Fla.Stat. (1993), was "procedural" and therefore did not affect the amount of punishment imposed, thus no Ex Post Facto Clause violation existed. This reasoning was taken from the Florida Supreme Court's opinion in *Dugger v. Rodrick*, 584 So.2d 4 (Fla.

1991) and adopted by *Hock*. The Petitioner submits *Hock* was wrongly decided and objects to the Report and Recommendation since it rests upon that foundation.

The Report and Recommendation relied on *Hock*, which erroneously concluded any disadvantage suffered by the Petitioner in that case, did not affect punishment. Petitioner contends that his sentence was significantly *increased* by the loss of accumulated provisional release credits. Specifically, he was released on October 1992 by getting credit for 1860 days of provisional release credits. After his release, a reinterpretation of Fla.Stat. § 944.277, provided for retroactive application and cancellation of his previously earned release credits. Thus, on June 8, 1993, he was rearrested and returned to prison with a new tentative release date of May 19, 1998. His sentence of imprisonment was lengthened by an additional five years. Certainly, this increase in sentence appears to be an increase in punishment, not a mere "procedural" change but one of great substance causing tremendous suffering to Petitioner.

Contrary to the conclusory opinion of *Hock*, an inmate does have a reasonable expectation he will become eligible for provisional release credits due to a change in the population level at prison. *Id. at 1472*. Typically, at plea bargaining, clients are advised that due to overcrowding they will be released much earlier and rely on this advice in entering their pleas and at sentencing.

For *ex post facto* purposes, early release in Florida affects substantive matters of punishment and is just as much a part of the penalty structure as the basic gaintime at issue in *Weaver v. Graham*, 450 U.S. 24 (1981) and *Raske v. Martinez*, 876 F.2d 1496 (11th Cir. 1989); as well as the sentencing guidelines at issue in *Miller v. Florida*, 482 U.S. 423 (1987). These sentencing procedures were designed to address overcrowding and to maximize the duration of incarceration consistent with limited correctional resources.

In addition, the *Hock* case is distinguishable from the Petitioner's case. First, *Hock* deals with control release, a discretionary program, which provides for parole-like release. The statute provides that "no inmate has a right to control release" and sets forth numerous eligibility factors that are irrelevant to provisional release credits. § 947.146(2); (6), Fla. Stat. (1993). In contrast, the Petitioner had an unqualified right to be released on his provisional release date. § 944.277(5), Fla.Stat. (1991). Control release was not in effect at the time Petitioner committed his offense and he makes no claim regarding it. Also *Hock* addresses eligibility to receive control release credits, not cancellation of previously granted provisional release credits, fully quantified and predictable. *Id. at 1472-73*. Finally, eligibility for and cancellation of provisional release credits directly affects the severity of punishment herein.

Clearly, the revocation of previously earned provisional release credits was an *ex post facto* violation of the U.S. and Florida Constitution. Based on the holding in *Weaver* and *Raske*, the Petitioner is entitled to relief.

Accordingly, the Petitioner objects to the Report and Recommendation in the instant case.

DATED this 24th day of April, 1995.

/s/ Joel T. Remland
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Docket Number 94-891-Civ-Orl-18

KENNETH LYNCE

v.

HAMILTON MATHIS, *et al*

Judge G. Kendall Sharp

JUDGMENT IN A CIVIL CASE

- ☒ Decision by Court. This action came before the Court with the judge named above presiding and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Petitioner, Kenneth Lynce take nothing and the action be dismissed.

Clerk

DAVID L. EDWARDS

(By) Deputy Clerk

/s/ John McClung

Date May 10, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

[Title Omitted in Printing]

ORDER

Petitioner's Request for A Certificate of Probable Cause (Doc. No. 28, filed June 8, 1995) is DENIED. Petitioner has not made a colorable showing of the deprivation of any federal constitutional right.

DONE AND ORDERED in Chambers at Orlando, Florida, this 16 day of June, 1995.

/s/ G. Kendall Sharp

G. KENDALL SHARP

United States District Judge

[Filed Oct. 16, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-2773

KENNETH LYNCE,
Petitioner-Appellant,

versus

HAMILTON MATHIS, Superintendent; ROBERT A. BUTTER-
WORTH, Attorney General of the State of Florida;
HARRY K. SINGLETARY, JR., as Secretary of the Florida
Department of Corrections,
Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Appellant's application for a certificate of probable
cause is DENIED.

/s/ J. L. Edmondson
United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

No. 95-7452

KENNETH LYNCE,
Petitioner

v.

HAMILTON MATHIS, Superintendent, Tomoka
Correctional Institution, *et al.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

ON CONSIDERATION of the motion for leave to
proceed herein in forma pauperis and of the petition for
writ of certiorari, it is ordered by this Court that the
motion to proceed in forma pauperis be, and the same is
hereby, granted; and that the petition for writ of certiorari
be, and the same is hereby, granted limited to Question 1
presented by the petition.

May 13, 1996